Supreme Court, U.S.
FILED

(1)

No. 97-740 OCT 29 1997

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In The

Supreme Court of the United States

October Term, 1997

ROBERT SCHWALBE, individually and in his official capacity; and DARRELL DEAN, individually and in his former official capacity,

Petitioners,

v.

MICHAEL WALKER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a case against a government employer alleging employee discipline in retaliation for speech protected by the First Amendment, the employer is entitled to qualified immunity if the reason asserted for the discipline is objectively reasonable without regard to the employer's alleged subjective retaliatory intent?

2. Whether, in such a case, if the subjective intent of the government employer may be considered in the qualified immunity analysis, the plaintiff employee must be required to prove the alleged unconstitutional intent by a heightened evidentiary standard?

3. Whether, in such a case, the government employer is entitled to qualified immunity when the "clearly established law" with which the employer should have been aware lacked materially similar facts?

PARTIES BELOW

The parties to the proceedings below were Michael Walker, Plaintiff-Appellee, and Robert Schwalbe and Darrell Dean, Defendants-Appellees. David Evans, the former Director of the Division of Mental Health/Mental Retardation for the State of Georgia, was named in his official capacity only, and has been replaced in that capacity by Carl E. Roland, Jr. pursuant to Rule 25(a), Fed. R. Civ. P. and Rule 43(c), F.R.A.P. The Court of Appeals' opinion also lists Roy Parrish, the Vice Chairman of the County Board of Health, as a Defendant-Appellant; however, Mr. Parrish was voluntarily dismissed with prejudice by Plaintiff in 1992 and has played no part in the subsequent appeals.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Robert Schwalbe and Darrell Dean, respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on May 15, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears as Appendix "A" at 1a and is reported at 112 F.3d 1127; the denial of Petitioners' Motion for Rehearing and Suggestion of Rehearing En Banc is printed as Appendix "B," App. 25a, but has not yet been reported. The District Court's unpublished opinion denying Petitioners' post-remand motion for summary judgment is printed as Appendix "C" at App. 27a.

JURISDICTION

The opinion of the Court of Appeals for the Eleventh Circuit was entered on May 15, 1997 and its denial of Petitioners' Motion for Rehearing and Suggestion of Rehearing En Banc was issued on August 29, 1997. This Court's jurisdiction is predicated on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia, shall be considered to be a statute of the District of Columbia.

STATEMENT

A. Facts

Respondent, a supervisor of a State mental retardation program, and two of his co-workers, claiming to be concerned about certain practices of their supervisors,

met with a group of State legislators and gave them a list of "possible improprieties" at VISTA, the public agency where they worked. Included on the list, in addition to various alleged misuses of public funds, was the matter of "nepotism at programs, relatives being hired." After the meeting, the legislators turned the list over to a State-level Office of Fraud and Abuse to see if further action was warranted. (Transcript of Preliminary Injunction Hearing, April 9-10, 1992, [hereinafter "Tr."] at 160).

The Office of Fraud and Abuse sent Petitioner Robert Schwalbe and another investigator to look into the complaints. (Tr. 29, 200). As a result of that investigation, several employees were reprimanded, separated, demoted or terminated, including the agency director. Schwalbe was named Acting Director of the VISTA Program and was delegated authority to recommend any other needed adverse personnel actions.

While serving as Acting Director, Schwalbe reviewed numerous agency contracts, including two that Respondent had signed with his own wife. After Respondent signed the contracts, they were routinely approved by Petitioner Dean and the agency director. Schwalbe learned that Respondent's wife had worked for Ms. Amanda Boyd, who was under the direct supervision of Respondent. Respondent and Boyd testified they thought this arrangement was permissible because they checked the policy manual in the personnel office; however, Petitioners presented evidence that the regulation upon which they relied was out-of-date. (Tr. 50, 100, 276). It was undisputed at the preliminary injunction hearing, although Respondent later attempted a dispute by affidavit, that the contracts violated then-current State and

VISTA regulations which provided that "[r]elatives shall not be employed or placed in positions or situations in which a superior-subordinate relationship will exist between the relatives through any line of authority. Any line of authority is construed to mean authority extending through one or more levels of management." (Trial Exh. D-4, Tr. 276-9). Because of this violation, Schwalbe recommended that Respondent be demoted from Services Coordinator, Senior to Services Coordinator, which resulted in a loss of pay of about $3200 a year. At least seven other VISTA employees were also disciplined, demoted or terminated for violation of the same nepotism policies. (Trial Exh. 38; Tr. 62, 65, 72, 231, 273). Respondent appealed administratively to Petitioner Schwalbe's supervisor, Petitioner Dean, who upheld the demotion. Rather than pursuing the remainder of his state administrative remedies, Plaintiff filed this action in federal court and later resigned to work in the private sector after his application for promotion to his previous job was denied.

B. Proceedings Below

In this damage action, brought pursuant to 42 U.S.C. § 1983, Respondent Walker, a State employee, claims he was demoted by his employers, Petitioners Schwalbe and Dean, in retaliation for his exercise of his First Amendment right to freedom of speech. Plaintiff sought a preliminary injunction, seeking to be reinstated to his former position, and to restrain Petitioners from taking any further allegedly retaliatory action against him; however, after a two-day hearing, the District Court declined to enter the requested injunction. At the conclusion of the hearing, the District Court indicated that it thought a jury

would rule in favor of Respondent, but observed that "the Court has difficulty finding itself that there is motivation for the action taken against Mr. Walker that results from his First Amendment rights" and, consequently, advised the parties to settle. (Tr. 319-20). After settlement was unsuccessful, Respondents' motion for summary judgment on the basis of qualified immunity was denied by the District Court as untimely without reaching the merits. The Eleventh Circuit Court of Appeals treated Petitioners' subsequent appeal as a petition for mandamus, granted it, and, in an unpublished opinion, directed the District Court to rule prior to trial on Petitioners' defense of qualified immunity.

Petitioners' post-remand motion for summary judgment on qualified immunity grounds was denied by the District Court on March 14, 1996. App. 53a. The District Court found that Respondent had satisfied the four-part test for examination of First Amendment retaliatory discharge claims and concluded that (1) Respondent's speech involved a matter of public concern; (2) Respondent's interest in speaking outweighed any of Petitioners' legitimate interests; (3) Respondent had established that his speech played a substantial part in Petitioners' decision to demote him; and (4) Petitioners had not established that they would have demoted Respondent even in the absence of the protected conduct. The District Court held that Petitioners were not protected by qualified immunity from proceeding to trial even though it acknowledged that its analysis was

> somewhat at odds with the proposition, established in *Harlow*, that qualified immunity is an objective analysis that does not consider a

> defendant's state of mind. The Court has extensively considered, therefore, whether the Court should ignore the fact that Plaintiff has established that Defendants had an illicit intent. Ignoring this fact would alter the qualified immunity inquiry. The Court would simply ask whether clearly established law indicated that Plaintiff could not be demoted for violating VISTA nepotism policy after he had uttered protected speech. The answer would clearly be "no."

App. 50a.

On Petitioners' appeal to the United States Court of Appeals for the Eleventh Circuit, they argued that the District Court had erred when it discarded the objective analysis demanded by *Harlow* and took into consideration whether Petitioners had an illicit intent to punish Respondent's alleged protected speech by the use of valid anti-nepotism policies. The Court of Appeals rejected Petitioners' argument with the following language:

> Defendants are correct that there is generally no subjective component to qualified immunity analysis and that the test is based on objective legal reasonableness. However, in the cases that held there should not be a subjective analysis, the official's state of mind was not an essential element of the underlying constitutional violation. Where the official's state of mind is an essential element of the underlying violation, the state of mind must be considered in the qualified immunity analysis or a plaintiff would almost never be able to prove that the official was not entitled to qualified immunity. We hold, as every Circuit that has considered this issue has held, that where subjective motive or intent

> is a critical element of the alleged constitutional violation the intent of the government actor is relevant.

112 F.3d at 1132; App. 13a. (Cits. omitted). The Court of Appeals therefore affirmed the District Court on May 15, 1997. 112 F.3d 1127; App. 15a. Petitioners' timely Motion for Rehearing and Suggestion of Rehearing En Banc was denied on August 29, 1997. App. 26a.

REASONS FOR GRANTING THE WRIT

Petitioners are aware that *Leonard Rollon Crawford-El v. Patricia Britton*, No. 96-827, is presently pending in this Court and is scheduled to be heard on December 1, 1997. The position of Petitioners herein is essentially the same as that of Judge Silberman, concurring in the opinion of the Court of Appeals for the District of Columbia in *Crawford-El*, who would have held that the subjective intent of a government official is not relevant to the qualified immunity inquiry. 93 F.3d 813, 834 (D.C. Cir. 1996) (Silberman, J., concurring). However, after reading the briefs of the parties and *amici* before this Court in *Crawford-El*, Petitioners are also in basic agreement with the position of Respondents therein that, if the subjective intent of government officials is to be considered at all in the qualified immunity analysis, plaintiffs should be required to prove the existence of discriminatory intent by clear and convincing evidence.

Petitioners also realize that the *Crawford-El* case may well be dispositive of the questions presented herein. Nevertheless, Petitioners submit that certiorari should be

granted in this case and the Court of Appeals opinion should be vacated and remanded for consideration of this Court's opinion in *Crawford-El*.

A. THE OPINION OF THE COURT OF APPEALS, BY CONSIDERING SUBJECTIVE INTENT IN ITS QUALIFIED IMMUNITY ANALYSIS, DIRECTLY CONFLICTS WITH OPINIONS OF THIS COURT

Today, some fifteen years after the landmark decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), it should be beyond dispute that Petitioners are entitled to "[q]ualified immunity . . . from civil trials (and the other burdens of litigation, including discovery) and from liability if their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." It should likewise be beyond cavil that the "touchstone of *Harlow*" is its requirement of "*objective* legal reasonableness." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (emphasis supplied).

However, by holding that "where subjective motive or intent is a critical element of the alleged constitutional violation the intent of the government actor is relevant," App. 13a, the Court of Appeals has deviated from this Court's long-standing objective standard, a deviation which, if allowed to stand, would return the law to the days prior to *Harlow* when the qualified immunity analysis had both an "objective" and a "subjective" aspect.

Before *Harlow*, the objective element involved knowledge of "basic, unquestioned constitutional rights,"

whereas the subjective component referred to "permissible intentions." *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The pre-*Harlow* test for defeating an official's qualified immunity was whether he "knew or should have known" that his actions would violate rights of the plaintiff, or whether he took the actions "with the malicious intent" to cause a deprivation of constitutional rights. *Id.* *Harlow*, however, "rejected the inquiry into state of mind in favor of a *wholly* objective standard." *Davis v. Scherer*, 468 U.S. 183, 191 (1984) (emphasis supplied). The *Harlow* Court "completely reformulated qualified immunity along principles not at all embodied in the common law, *replacing the inquiry into subjective malice* so frequently required at common law with an objective inquiry into the legal reasonableness of the official action." *Anderson, supra*, at 641 (emphasis supplied). *Accord*: *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (under *Harlow*, allegation of malice is not sufficient to defeat immunity); *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985) (*Harlow* purged qualified immunity doctrine of its subjective components).

In the context of the present case, *Harlow* looms even larger because it, too, was a First Amendment alleged retaliatory discharge case. Thus, the Court of Appeals' statement that "in the cases that held there should not be subjective analysis, the official's state of mind was not an essential element of the underlying constitutional violation" disregards the true import of *Harlow*. App. 13a. Indeed, the allegations in this case echo those in *Harlow*, where Fitzgerald, a management analyst for the Air Force, testified before a Congressional committee, "to the evident embarrassment of his superiors" about the cost overruns and technical difficulties in the C-5A transport

plane program. *Nixon v. Fitzgerald*, 457 U.S. 731, 733-734 (1982).[1] Fitzgerald later lost his job in a reduction in force taken to promote "economy and efficiency in the Armed Forces." *Id.* at 731. In Fitzgerald's subsequent damage action alleging wrongful discharge in retaliation for his discussions with the legislators in violation of two statutes and his First Amendment rights, the motions for summary judgment of Harlow and his co-defendants, President Nixon and White House aide Alexander Butterfield, were denied by the district court, which, as here, upheld the legal sufficiency of the First Amendment claim and found that genuine issues of disputed fact remained for resolution at trial. 457 U.S., at 805-806.

Notwithstanding the First Amendment nature of the case, the *Harlow* Court totally abandoned the subjective element of the good-faith defense because, as a question of fact ordinarily requiring resolution by a jury, it had proved "incompatible" with the Court's admonition that insubstantial claims should not proceed to trial. 457 U.S., at 815-816. This Court deplored the fact that "[i]t is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved." *Id.* at 817 n.29.[2] Therefore, an objective standard was

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[1] The facts in *Harlow* are the same as those in *Nixon v. Fitzgerald*, 457 U.S. at 802.

[2] In contrast, the Court of Appeals herein improperly said that whenever an employee can establish an issue of material fact as to whether the true reason for his discipline was speech, the case *must* go to trial. App. 14a-15a.

established to prevent the "substantial costs" – such as "inhibition of discretionary action, and deterrence of able people from public service" – which "attend the litigation of the subjective good faith of government officials" and which are "peculiarly disruptive of effective government." *Id.* at 816-817. *Accord*: *Elder v. Holloway*, 510 U.S. 510, 514 (1994) (central purpose of qualified immunity is to protect public officials from undue interference with their duties and from potentially disabling threats of liability). *Harlow*'s objective standard is supposed to be applied "across the board;" it is *not* to be tailored to the nature of the rights allegedly violated. *Anderson, supra*, at 645.

The philosophy underlying the qualified immunity doctrine set forth in *Harlow* is that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interests may be better served by action taken with independence and without fear of consequences." *Harlow, supra*, at 819. (Cits. and internal quotations omitted). This Court has subsequently emphasized that the "consequences" with which it was concerned in *Harlow* are "not limited to liability for money damages; they also include the general costs of subjecting officials to the risk of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (Cits. and internal quotations omitted).

The "driving force" behind *Harlow*'s "substantial reformulation of qualified-immunity principles" was to insure that "insubstantial claims" against government

officials could be resolved on summary judgment. *Anderson, supra,* at 640 n.2. "The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell, supra.* (Emphasis in original).

The opinion of the Court of Appeals thus not only contravenes the admonitions of *Harlow* and its progeny, but also decimates the important public policies underlying those decisions. Certiorari should therefore be granted to address these issues so vital to the operation of state governments throughout the country.

B. WHEN THE COURT OF APPEALS CONSIDERED SUBJECTIVE INTENT IN ITS QUALIFIED IMMUNITY ANALYSIS, IT SHOULD HAVE DETERMINED THE EVIDENTIARY STANDARD TO BE APPLIED

Even if the Court of Appeal's limiting gloss on *Harlow* were clearly the law, it raises yet other problems pointed out by Petitioners which were ignored below, but which should be addressed by this Court: how much evidence of malicious intent must be alleged or proven by a plaintiff before a defendant may be stripped of his "substantive defense of immunity"? *Seigert v. Gilley,* 500 U.S. 226, 236 (1991) (Kennedy, J., concurring). There is disagreement among the circuits on this question. *See, e.g., Crawford-El v. Britton,* 93 F.3d 813 (D.C. Cir. 1996) (First Amendment) (clear and convincing evidence of defendant's state of mind required); *Edwards v. Wallace Community College,* 49 F.3d 1517, 1524 (11th Cir. 1995)

(race discrimination) (grant of qualified immunity upheld because plaintiff had not presented any "concrete" evidence of discriminatory intent); *Tompkins v. Vickers*, 26 F.3d 603 (5th Cir. 1994) (First Amendment) (circumstantial evidence sufficient, but must be specific); *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991) (Fourth Amendment) (on summary judgment, plaintiff must show deliberate conduct or reckless disregard for consequences).

In the court below, Judge Birch candidly admits in his separate opinion (concurring in part and dissenting in part) that, not only is the precedent of the Eleventh Circuit "ambiguous," but that the entire state of the law is "unsettled" as to the correct analytical framework to be applied in qualified immunity cases where subjective intent questions are raised. App. 23-24a n.3.

As noted above, Petitioners support the position of Judge Silberman in *Crawford-El* that "when the defendant asserts a legitimate motive for his or her action, only an objective inquiry into the pretextuality of the assertion is allowed. If the facts establish that the purported motivation would have been reasonable, the defendant is entitled to qualified immunity." 93 F.3d at 834 (Silberman, J., concurring). However, even if that view should not prevail, this Court should adopt the rationale of the majority opinion filed by Judge Williams in *Crawford-El* and rule that "unless the plaintiff offers clear and convincing evidence on the state-of-mind issue at summary judgment and trial, judgment or directed verdict (as appropriate) should be granted for the individual defendant." *Id.*, at 815.

C. THE COURT OF APPEALS APPLIED THE WRONG ANALYTICAL FRAMEWORK AND FAILED TO IDENTIFY THE CLEARLY ESTABLISHED LAW WITH MATERIALLY SIMILAR FACTS OF WHICH PETITIONERS SHOULD HAVE BEEN AWARE

The Court of Appeals should have ruled that Petitioners were entitled to qualified immunity from trial because there was no clearly established law in December 1991 which would have put Petitioners on notice that, even construing the facts most favorably to Respondent, they could not demote Respondent when he violated anti-nepotism regulations and policies after he had uttered protected speech. Even the District Court admitted there was no such law. App. 50a.

The only cases the Court of Appeals thought "materially similar" to the facts of the instant case were *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563 (1968) and *Bryson v. City of Waycross*, 888 F.2d 1562 (11th Cir. 1989). App. 14a. However, both are inapposite. In *Pickering*, a school teacher was fired solely by the school board for sending a letter to a local newspaper, criticizing the board's tax raising efforts. 391 U.S. at 564. In *Bryson*, where a police captain was fired for filing a complaint with the city manager alleging that the police chief had stolen whiskey from the evidence room, the *holding* – the most important element of the case, *Hamilton v. Cannon*, 80 F.3d 1525, 1530-31 (11th Cir., 1996) – was that there was *no* First Amendment violation. 888 F.2d at 1567. If Petitioners had read *Pickering* and *Bryson*, they certainly would not have been compelled to think they could not discipline Respondent for the violation of anti-

nepotism policies just because he may have talked to State legislators. Public officials should not be obligated to be creative or imaginative in drawing analogies from previously decided cases. Although the very action in question need not have been declared unlawful, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson, supra,* at 640. Since Petitioners could not tell in 1991 that their actions would be unlawful, and the answer has had to await full adjudication in federal court years later, they deserve qualified immunity from trial and liability.

CONCLUSION

The petition for a writ of certiorari should be g~anted.

Respectfully submitted,

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APPENDIX A

Michael WALKER, Plaintiff-Appellee,

v.

Robert SCHWALBE, individually, and in his official capacity; Darrell Dean, individually and in his former official capacity; Roy Parrish, individually and in his official capacity; David Evans, in his official capacity only, Defendants-Appellants.

No. 96-8338.

United States Court of Appeals,
Eleventh Circuit

May 15, 1997.

County employee brought suit against his superiors under § 1983 for violating his right to First Amendment speech by demoting him in retaliation for whistleblowing to state legislators. The United States District Court for the Northern District of Georgia, No. 4:92-CV-010-HLM, Harold L. Murphy, J., denied defendants' motion for summary judgment based on qualified immunity, they brought interlocutory appeal. The Court of Appeals, Farris, Senior Circuit Judge, sitting by designation, held that: (1) where subjective motive or intent is a critical element of alleged constitutional violation, intent of government actor is relevant, and must be considered in qualified immunity analysis, and (2) evidence raised genuine issue of material fact whether employee was demoted in retaliation for whistleblowing, in violation of the First Amendment, precluding summary judgment on ground of qualified immunity.

Affirmed.

Roney, Senior Circuit Judge, filed concurring opinion.

Birch, Circuit Judge, filed opinion concurring in part and dissenting in part.

Carol Atha Cosgrove, Office of State Attorney General, Atlanta, GA, Ronald R. Womack, LaFayette, GA, for Schwalbe/Dean/Evans.

John W. Davis, Jr., Rossville, GA, Amy S. Gellins, Law Offices of Amy Gellins, Athens, GA, for Walker.

Appeal from the United States District Court for the Northern District of Georgia.

Before BIRCH, Circuit Judge, and RONEY and FARRIS,* Senior Circuit Judges.

FARRIS, Senior Circuit Judge:

Defendants interlocutorily appeal the district court's holding that they are not entitled to qualified immunity. We have jurisdiction pursuant to 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (denial of qualified immunity is immediately appealable under the collateral order doctrine). We affirm.

BACKGROUND

Vista Community Programs provides social services for Walker, Chattooga, Catoosa, and Dade counties in northern Georgia. Vista is funded by the Walker County Board of Health through a contract with the Georgia

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* Honorable Jerome Farris, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

Department of Human Resources. Michael Walker was hired by Vista in 1982. In 1986 he was promoted to supervise all Vista services for the developmentally disabled. He was responsible for all budgetary issues pertaining to mental retardation programs. Throughout his career he received excellent performance reviews.

Darrell Dean was in charge of overseeing Vista as the Department of Human Resources District Health Director. In 1988 he hired Robert Wesley as Vista's Area Director and Tom Nickell as Vista's business manager. Wesley was Walker's superior at Vista.

During Wesley and Nickell's tenure, Vista budget information supplied to employees became less accurate. Walker complained to Wesley and Nickell that some budget practices violated Department regulations and prevented Walker from effectively managing the budgets for which he was responsible. After Walker and others voiced these concerns, Wesley and Nickell began to withhold budget information from Vista employees.

Walker also expressed concern to Wesley that (1) the garage Vista used to service its vehicles (chosen by Wesley without receiving bids) charged exorbitant prices and was not properly fixing the vehicles, (2) Wesley had directed all employees to have their Vista vehicles cleaned at a business run by Vista employees and their relatives, and (3) employee committees, which met during work hours, conducted fund-raising in the community to raise money allegedly for Vista but instead used the money for weekend social activities.

In July 1991 Georgia's governor directed all state agencies to submit budget reduction proposals. Walker

learned that Wesley and Nickell had proposed closing Vista's Chattooga County Service Center. Walker urged them to reconsider because he believed the proposed closure was inconsistent with the Department of Human Resources' budget proposal request. The defendants claim that Walker also learned that there was a proposal to cut his position.

When Walker's efforts with Wesley and Nickell failed he sought assistance from state legislators. In August 1991 high-level Vista employees Ernest Taylor, Nora Swafford, and Walker met with several state representatives and senators. They discussed Walker's budgetary concerns and a three-page list of "possible improprieties" at Vista. When Walker had knowledge of a particular impropriety he shared that information. He was primarily concerned with budget expenditures, the car wash service, and the car repair service. Walker stated in his deposition that he never feared that Wesley's budget proposal would cost him his job because he believed he was protected by the state merit system policies. The defendants claim that Taylor had prepared the list of improprieties and was the person primarily concerned about the improprieties, that Walker did not know about the list and was only involved to protect his job, and that the legislators already knew of these problems.

As a result of the meeting with state legislators, the Department of Human Resources began an investigation of impropriety at Vista. David Nave conducted the investigation, assisted by Robert Schwalbe. In October, Dean (the Department of Human Resources employee who oversaw Vista) informed Vista staff that Wesley and Nickell were being dismissed, that Dean would be assuming

the responsibilities of Area Director, and that Schwalbe would be assuming Nickell's former position. Dean delegated responsibility to Schwalbe for most daily administrative activities at Vista.

In November 1991 Nave completed the investigative report. It concluded that Vista had been mismanaged, that there had been misconduct and violations of Georgia law, and that Vista administration had shown little regard for Department policy. The report included investigations of several alleged instances of nepotism and concluded that at least one was a clear violation. The investigation and report generated a great deal of media attention in northwest Georgia. Dean ultimately resigned his position at the Department of Human Resources due to the investigation and media attention.

Some Walker County Board of Health members were upset that the legislators, not the Board, had been contacted about the improprieties. The Board was also embarrassed about the negative publicity. It considered refusing to renew the county's status as lead funding county for Vista. Members of the Board were aware that Walker was among those who had complained to the legislators.

In 1990 and 1991 Walker's wife, Crystal Walker, served as a Vista teacher consultant. Her immediate supervisor was Amanda Boyd, Director of the Walker County Service Center. Walker was Boyd's superior in the Vista mental retardation program. Prior to hiring Mrs. Walker, Walker and Boyd reviewed all available written policies regarding employment of relatives to ensure that it was permitted. Walker suggested that Boyd contact the

personnel office regarding the issue. The Georgia Department of Human Resources Administrative Policy and Procedures Manual stated that employment of relatives, which includes spouses, is not precluded, but that relatives shall not be employed in situations in which a direct superior-subordinate relationship would exist.

Walker and Boyd concluded that Mrs. Walker could be hired, and agreed that Boyd would be wholly responsible for all supervision, terms, and conditions of her employment. Walker, Wesley, and Dean each signed Mrs. Walker's contract.

Defendants have produced documents, which they allege were the applicable policies, that prohibit the employment of any relatives in an employee's entire chain of command.

After the release of the investigative report, Schwalbe met with Walker and stated that a member of the Walker County Board of Health had asked Schwalbe to review the Vista contracts with Mrs. Walker. The next day Schwalbe gave Walker a notice of proposed demotion and disciplinary salary reduction. The notice charged that Walker had violated Vista conflict of interest policies by hiring his wife. It also stated that Walker was "negligent and inefficient" for directing a subordinate to obtain approval from Walker's superior for the contract with his wife.

Walker pursued a written appeal to Dean on December 16, 1991. Dean upheld the proposed demotion and salary reduction, which amounted to almost $3,200 a year. Schwalbe and Dean each knew that Walker had been one of the employees who had spoken with the legislators.

On December 19 Dean informed Walker he would be transferred to another Vista center forty miles from his home. Walker later applied for a promotion to his previous position but was denied without an interview. He subsequently abandoned his career at Vista. Defendants presented evidence that other Vista employees were disciplined for violating anti-nepotism policies.

After the meeting with the legislators, Taylor (the Vista employee who had prepared the list of improprieties) was removed from the management team at Vista and placed under the authority of one of his subordinates. After the investigation, Swafford (the third Vista employee who met with the legislators) was removed from the management team at Vista and transferred from the office where she had worked for twelve years. No justifications were given for these actions.

Walker filed suit under 42 U.S.C. § 1983 against Schwalbe and Dean for violating his right to First Amendment speech by demoting him in retaliation for his conversation with the legislators. Defendants moved for summary judgment. The district court held that Walker had established a genuine issue of material fact that he was demoted in retaliation for his speech and that the defendants were therefore not entitled to a ruling of qualified immunity prior to trial. The defendants appeal interlocutorily.

DISCUSSION

QUALIFIED IMMUNITY

A. Standard of Review

A district court's ruling that an official's conduct violated clearly established law so that the official is not entitled to a ruling of qualified immunity prior to trial is reviewed de novo. *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817-18, 86 L.Ed.2d 411 (1985); *John[illegible] v. Clifton*, 74 F.3d 1087, 1090 (11th Cir.), *cert. denied sub nom Hill v. Clifton*, ___ U.S. ___, 117 S.Ct. 51, 136 L.Ed.2d 15 (1996).

B. Method of Review

A defendant may interlocutorily appeal a district court's holding that he is not entitled to qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817-18, 86 L.Ed.2d 411 (1985). Where this occurs there are effectively two issues on appeal: (1) whether the district court's holding that a genuine issue exists as to what conduct the official engaged in was correct, and (2) whether the official is entitled to qualified immunity for that conduct. The first issue is factual, the second legal. *Johnson v. Jones*, 515 U.S. 304, ___-___, 115 S.Ct. 2151, 2156-59, 132 L.Ed.2d 238 (1995).

Where, as here, the defendants contest the district court's legal holding, we may also consider the factual issue because it is part of the core qualified immunity analysis. *Johnson v. Clifton*, 74 F.3d at 1091. We do so, and "simply take, as given, the facts that the district court assumed when it denied summary judgment for that

(purely legal) reason." *Id.; see Cooper v. Smith*, 89 F.3d 761, 762 (11th Cir.1996) (in most qualified immunity interlocutory appeals the appellate court accepts the facts that the district court assumed).

C. Genuine Issue of Material Fact as to Defendants' Conduct

We analyze First Amendment retaliatory demotion claims under a four-part test: (1) whether the employee's speech involves a matter of public concern, (2) whether the employee's interest in speaking outweighs the government's legitimate interest in efficient public service; (3) whether the speech played a substantial part in the government's challenged employment decision, and (4) whether the government would have made the same employment decision in the absence of the protected conduct. *Beckwith v. City of Daytona Beach Shores*, 58 F.3d 1554, 1563-64 (11th Cir.1995) (citing *Bryson v. City of Waycross*, 888 F.2d 1562, 1565-66 (11th Cir.1989)).

First, we examine the content, form, and context of the employee's speech to determine whether it addresses a matter of public concern. *Bryson*, 888 F.2d at 1565. Viewing the evidence in the light most favorable to Walker, Walker spoke with the legislators because he was concerned with how Vista funds were being spent. "[A] core concern of the first amendment is the protection of the 'whistle-blower' attempting to expose government corruption." *Id.* at 1566. Walker spoke at a meeting with elected public officials about improving the services Vista provides to the public. Viewing the evidence in the light

most favorable to Walker, his speech was on a matter of public concern.

Second, Walker had a significant interest in speaking with the legislators in order to prevent harm to the Vista program and the community it serves. Defendants argue they have a significant interest in enforcing the anti-nepotism policy. This is beside the point. The issue is whether the government has an interest in preventing the speech. Whether the government had valid reasons for its actions is only relevant to the third part of the test. Viewing the evidence in the light most favorable to Walker, defendants have no legitimate reason for preventing Walker's speech. The second element of the *Bryson* test is satisfied.

Third, an employee's initial burden to demonstrate that a retaliatory intent was a substantial factor behind the government's employment decision is not a heavy one. *Beckwith*, 58 F.3d at 1565. Walker has produced evidence that Dean had a motive to retaliate against Walker because his speech led to the investigation that led to Dean's resignation. The investigation embarrassed members of the Walker County Board of Health. The Board asked Schwalbe to investigate Mrs. Walker's contract. Schwalbe had a motive to retaliate because he answered to Dean and the Board.

There is a genuine issue as to which nepotism policy was in effect when Mrs. Walker was hired. Viewing the evidence in a light most favorable to Walker, he did not violate any applicable policy. Even if the broader anti-nepotism policy was in effect, Walker still received a severe penalty where it appears he did everything he

could to make sure he was acting within Vista regulations. In addition, the second of the two reasons given for the demotion, that Walker was "negligent and inefficient" for having a subordinate check with a superior about the proper regulations, is illogical considering the situation. Walker may well have been attempting to make sure that there was no actual impropriety and no appearance of it, but we do not resolve questions of fact.

Finally, adverse employment actions were also taken against Taylor and Swafford, the other two Vista employees who met with the legislators. From this evidence a factfinder could reasonably conclude that the people who spoke with the legislators were punished for doing so.

Defendants have presented credible evidence that Walker only talked with the legislators out of concern for his own job and that he was only fired for violating the anti-nepotism policy. However, viewed in the light most favorable to Walker, the facts demonstrate that his speech played a substantial role in his demotion. Walker has satisfied the third element of the *Bryson* test.

Fourth, reasonable inferences from the same evidence, viewed in the light most favorable to Walker, show that the defendants would not have taken the same action in the absence of Walker's protected conduct.

The district court could properly conclude that, viewed in the light most favorable to Walker, the circumstantial and direct evidence produced by Walker established that he was demoted in retaliation for his speech.

D. Qualified Immunity

Even though Walker has established a genuine issue of material fact, the defendants may be protected from liability by the doctrine of qualified immunity. Qualified immunity "protects government officials . . . from liability if their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Lassiter v. Alabama A & M University,* 28 F.3d 1146, 1149 (11th Cir.1994) (en banc) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)).

"When considering whether the law applicable to certain facts is clearly established, the facts of cases relied upon as precedent are important. The facts need not be the same as the facts of the immediate case. But they do need to be materially similar." *Lassiter,* 28 F.3d at 1150 (quoting *Adams v. St. Lucie County Sheriff's Dept.,* 962 F.2d 1563, 1573, 1575 (11th Cir.1992) (Edmonson, J., dissenting), *approved en banc,* 998 F.2d 923 (11th Cir.1993)). Qualified immunity focuses on the actual, specific details of concrete cases. *Lassiter,* 28 F.3d at 1149-50. Plaintiffs may not discharge their burden by referring to general rules and abstract rights. *Id.* at 1150. "Only in the rarest of cases will reasonable government officials truly know that the termination or discipline of a public employee violated 'clearly established' federal rights." *Hansen v. Soldenwagner,* 19 F.3d 573, 576 (11th Cir.1994).

Defendants contend that the qualified immunity doctrine requires an objective analysis that does not consider a defendant's state of mind. Therefore, defendants argue, they are entitled to qualified immunity because Walker's

violation of the anti-nepotism policy was an objectively valid reason to demote him, and the defendants' subjective, allegedly retaliatory, intent in doing so is irrelevant. *See id.* at 578 (subjective motivation of officials is irrelevant to whether qualified immunity exists).

Defendants are correct that there is generally no subjective component to qualified immunity analysis and that the test is based on objective legal reasonableness. *Anderson v. Creighton,* 483 U.S. 635, 641, 107 S.Ct. 3034, 3039-40, 97 L.Ed.2d 523 (1987); *Lassiter,* 28 F.3d at 1150. However, in the cases that held there should not be subjective analysis, the official's state of mind was not an essential element of the underlying constitutional violation. *Tompkins v. Vickers,* 26 F.3d 603, 607-08 (5th Cir.1994). Where the official's state of mind is an essential element of the underlying violation, the state of mind must be considered in the qualified immunity analysis or a plaintiff would almost never be able to prove that the official was not entitled to qualified immunity.

We hold, as every Circuit that has considered this issue has held, that where subjective motive or intent is a critical element of the alleged constitutional violation the intent of the government actor is relevant. *See Tompkins,* 26 F.3d at 608 (5th Cir.) (subjective intent must be considered in qualified immunity analysis where the official's motive or intent is a critical element of the constitutional violation); *Branch v. Tunnell,* 937 F.2d 1382 (9th Cir.1991) (same); *Siegert v. Gilley,* 895 F.2d 797 (D.C.Cir.1990) (same), *aff'd on other grounds,* 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991); *Pueblo Neighborhood Health Centers v. Losavio,* 847 F.2d 642 (10th Cir.1988) (same); *Poe v. Haydon,* 853 F.2d 418 (6th Cir.1988); *Musso v. Hourigan,* 836

F.2d 736 (2d Cir.1988) (same); *see also Ratliff v. DeKalb County*, 62 F.3d 338, 341 (11th Cir.1995) (subjective intent is relevant to qualified immunity analysis if discriminatory intent is a specific element of the constitutional tort).

The government official's state of mind is a critical element in First Amendment retaliatory demotion claims. It must be considered in this case. Because Walker has established a genuine issue of material fact as to retaliation, it must be assumed at this stage that the defendants did retaliate against him for his speech.

At the time the defendants acted in 1991, clearly established law informed reasonable government officials that Walker could not be punished for his First Amendment speech. *See Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) (criticism of Board of Education by employee for its allocation of school funds is a matter of public concern and protected by the First Amendment); *Bryson*, 888 F.2d at 1566 (1989) (core concern of First Amendment is protection of whistle-blower attempting to expose government corruption). The facts of these cases are materially similar to the instant case. *Lassiter*, 28 F.3d at 1150. The law against retaliation for exercise of First Amendment rights was clearly established.

Defendants argue that denial of qualified immunity here would be equivalent to the court's holding that once an employee has engaged in First Amendment speech he may no longer be punished for valid reasons. This argument misses the point. An employee may still be punished for valid reasons. However, when the employee can establish a genuine issue of material fact that the true

reason for the punishment was actually the speech, then the case must go to trial.

Defendants spend a substantial portion of their briefs arguing that they are entitled to qualified immunity because there is no clearly established law that a demotion for violation of an anti-nepotism policy violates a person's rights. This argument is inapposite. Walker has established a genuine issue that he was demoted in retaliation for his speech. The qualified immunity analysis is therefore made under the assumption that he was demoted for this reason.

A reasonable Vista official could not have thought that he could retaliate against Walker for exercising his First Amendment speech rights. Further, a reasonable official could not have thought that he could retaliate against Walker for exercising his rights under the guise of the anti-nepotism policy.

AFFIRMED.

RONEY, Senior Circuit Judge, concurring:

I concur. When the defendants first moved for qualified immunity, the district court denied it as untimely. On appeal, a panel of this Court issued a *writ of mandamus* directing the district court to rule prior to trial on defendants' defense of qualified immunity. The district court responded by deciding that the defendants are not entitled to qualified immunity on this record. It seems to me that we have jurisdiction and the responsibility to decide, prior to trial, whether the district court properly denied that motion. Even if we do not, no harm is done. The trial would continue either way. I understand Judge Farris's

opinion as deciding only an issue of law. squarely presented by the motion for qualified immunity, and although evidentiary and factual issues may have been argued on this appeal, the affirmance by this Court does not hinge on a resolution of those factual issues.

BIRCH, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority's determination that the speech at issue in this case fairly may be characterized as constituting speech on a matter of public concern. I therefore concur in the majority's conclusion that the facts presented, viewed in the light most favorable to the plaintiff, sufficiently establish an underlying First Amendment claim. I believe, however, that we lack jurisdiction to review the remaining – and more fundamental – argument advanced by the defendants on the issue of qualified immunity. For this reason, I respectfully dissent from that portion of the majority's decision discussing and concluding that the defendants are not entitled to qualified immunity with respect to Walker's retaliation claim.

The Supreme Court most recently articulated the jurisdictional underpinnings of an interlocutory appeal based on qualified immunity in *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) and *Behrens v. Pelletier*, ___ U.S. ___, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996). In *Johnson*, although the defendants appealed the denial of their summary judgment motion based on the assertion of a qualified immunity defense, the Supreme Court found that they had failed to raise the purely legal

question of qualified immunity – that is, whether, viewing the facts in the light most favorable to the plaintiff, the law was clearly established that the defendants violated the plaintiff's constitutional right. Rather, the Court found that the only issue on appeal was whether the record thus far supported the plaintiff's claim that the defendants had engaged in the conduct of which the plaintiff accused them. The district court had found this factual issue to be in dispute. The Court concluded that, although this factual issue arose in the context of qualified immunity, it nonetheless was nothing more than a question of evidentiary sufficiency, "i.e., which facts a party may, or may not, be able to prove at trial," *Johnson*, 515 U.S. at ___, 115 S.Ct. at 2156, and as such was not an appealable, final order. In reaching its decision, the Court noted that " 'a qualified immunity ruling . . . is . . . a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case.' " *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 n. 10, 105 S.Ct. 2806, 2817 n. 10, 86 L.Ed.2d 411 (1985)) (omissions in original). The Supreme Court subsequently clarified *Johnson* in *Behrens*, 116 S.Ct. 834. Although *Behrens* concerned primarily the propriety of multiple interlocutory appeals on the issue of qualified immunity, the Court explained:

> *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not

> truly "separable" from the plaintiff's claim, and hence there is not a "final decision". . . . *Johnson* reaffirmed that summary-judgment determinations are appealable when they resolve a dispute concerning an "abstract issue of law" relating to qualified immunity – typically, the issue whether the federal right allegedly infringed was "clearly established."

Behrens, ___ U.S. at ___, 116 S.Ct. at 842 (citations and brackets omitted). Bearing in mind the language of *Johnson*, our court has been careful to construe narrowly our jurisdiction over interlocutory appeals involving the qualified immunity question. *See, e.g., Johnson v. Clifton*, 74 F.3d 1087, 1091 (11th Cir.) ("[T]he factual issue . . . can only be heard because it is a necessary part of the core qualified immunity analysis, the resolution of which constitutes a final, collateral order; when the core qualified immunity issue is not appealed, then the factual issue may not be either."), *cert. denied*, ___ U.S. ___, 117 S.Ct. 51, 136 L.Ed.2d 15 (1996); *Ratliff v. DeKalb County*, 62 F.3d 338, 341 (11th Cir.1995) ("[W]e decline to review the denial of summary judgment on [the] ground . . . [that] the district court in considering defendant's motions assumed erroneous facts or assumed facts which were unsupported by the evidence in the record.").

The defendants submit that they demoted Walker for violating a state anti-nepotism policy; according to the defendants' version of events, the fact that Walker also may have exercised his rights under the First Amendment (which they dispute) is irrelevant and coincidental. In my view, the defendants do not posit the question of whether, assuming that the defendants did fire Walker for engaging in protected activity, the defendants are entitled

nonetheless to qualified immunity; rather, the defendants ask that we assume all facts as the defendants allege them to be and find, on that basis, that their conduct did not violate any clearly established law. I believe that we do have jurisdiction to determine whether the district court's factual findings support the defendants' factual contention that Walker violated a valid anti-nepotism policy in place at the time these events transpired.[1] Moreover, were we to find conclusive evidentiary support for the defendants' version of the facts in this case, our circuit precedent suggests that we could exercise jurisdiction to resolve the question presented by the defendants regarding qualified immunity. This is not the circumstance presented here. The district court found a predicate fact to be in dispute – that is, the court found a question of fact to exist as to what specific state regulation governing VISTA employees was in place at the time Walker acted; we have not found that the district court erred with respect to this finding. I do not believe that the posture of this case as it

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[1] It is worth noting that our circuit precedent is not entirely clear regarding the extent to which we may conduct independent factual review of disputed issues of fact in an interlocutory appeal based on qualified immunity. *Compare Ratliff v. DeKalb County*, 62 F.3d at 341 ("[W]e decline to review the denial of summary judgment on [the] ground . . . [that] the district court in considering defendant's motions assumed erroneous facts or assumed facts which were unsupported by the evidence in the record.") with *Cottrell v. Caldwell*, 85 F.3d 1480, 1486 (11th Cir.1996) ("In exercising our interlocutory review jurisdiction in qualified immunity cases, we are not required to make our own determination of the facts for summary judgment purposes; we have the discretion to accept the district court's findings if they are adequate. But we are not required to accept them.") (citations and quotation omitted).

has been framed by the defendants permits us to "assume" either that Walker did, in fact, violate a state law or that the defendants demoted him solely for asserting his right to free speech. As a result, we cannot evaluate properly the extent to which the application of materially similar facts to the law might have clearly established that the defendants' conduct violated (or did not violate) Walker's constitutional rights.

The defendants offer no justification for violating Walker's First Amendment right on the basis that Walker's exercise of that right affected their ability to "promote the efficiency of the public services [the state] performs," *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir.1989), because they contend that they demoted him for an entirely different reason – i.e., the violation of a valid state anti-nepotism policy. Indeed, the defendants do not argue in this appeal that, viewing the facts in the light most favorable to the plaintiff, they nonetheless are entitled to qualified immunity. Rather, the defendants argue, in essence, that viewing the facts as the defendants allege them to be, they had another legitimate reason for demoting Walker, separate and apart from any First Amendment concerns. Because there is no conclusive support for the defendants' version of the facts, the defendants' challenge effectively requires that we decide a factual issue – whether there is conclusive foundation to confirm the defendants' contention that Walker did violate state law – based neither on the record nor the drawing of reasonable inferences based on facts previously found. In my opinion, this type of purely factual

decision-making is not the proper subject of an interlocutory appeal based on qualified immunity.[2]

This is not to say that we may never exercise jurisdiction whenever the underlying intent of a state actor is intertwined with the issue of qualified immunity; indeed, our circuit precedent holds otherwise. *See, e.g., McMillian v. Johnson,* 88 F.3d 1554 at 1566 (11th Cir.1996) ("[W]e have held that intent or motivation may not be ignored when intent or motivation is an essential element of the underlying constitutional tort. . . . When [defendants'] purpose to punish [the plaintiff] is considered, there is no question that their conduct violated clearly established law.") The question of how to reconcile the subjective component of the intent determination often implicated in a discrimination action with the objective nature of qualified immunity was most recently addressed in *Foy v. Holston,* 94 F.3d 1528 (11th Cir.1996). *Foy* involved the state's removal of two children from a religious community to foster care. The plaintiffs claimed the state's conduct was motivated by religious discrimination; the state proffered evidence to show that the children were being mistreated. Acknowledging that the discriminatory-intent element "can cloud the question of whether the official acted lawfully or unlawfully in the circumstances," *id.* at

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[2] *See also Carnell v. Grimm,* 74 F.3d 977, 979 (9th Cir.1996) ("[I]nsofar [as] a genuine issue of material fact exists for trial, namely whether Carnell informed the officers that she had been raped, we conclude that we do not have jurisdiction [under *Johnson v. Jones*] to address that issue. And the resolution of that disputed issue of fact impacts the question whether reasonable officials could have believed their conduct . . . was lawful in light of the circumstances.") (citation omitted).

1534, we held that the defendants nonetheless were entitled to qualified immunity:

> One trigger to the doctrine's application depends upon whether the record establishes that the defendant, in fact, did possess a substantial lawful motive for acting as he did act. At least when an adequate lawful motive is present, that a discriminatory motive might also exist does not sweep qualified immunity from the field even at the summary judgment stage . . . . Where the facts assumed for summary judgment purposes in a case involving qualified immunity show mixed motives (lawful and unlawful motivations) and pre-existing law does not dictate that the merits of the case must be decided in plaintiff's favor, the defendant is entitled to immunity.
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> . . . [T]he record does show Defendants had, in fact, cause to understand that [a child] was possibly being mistreated. The record also shows Defendants were, in fact, aware of information that would warrant investigation of other children. . . .
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> . . . .
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> . . . . Because, given the circumstances and the state of the law, a reasonable child custody worker could have considered Defendants' conduct arguably proper even if Defendants were motivated in substantial part by unlawful motives, Defendants' conduct was objectively reasonable for the purposes of qualified immunity.

Foy, 94 F.3d at 1534-35. In *Foy*, unlike this case, "the record, in fact, show[ed] substantial lawful intent, while

not ruling out some unlawful intent, too." *Id.* at 1535 n. 9. Moreover, even assuming that the defendants in *Foy* acted with some discriminatory animus, the law did not clearly establish that a reasonable social worker faced with evidence of child abuse should not act to remove a mistreated child from the abusive environment. These factors critically distinguish *Foy* from the instant action; here, the record does not show conclusively that the defendants possessed, at least in part, a lawful motive for their conduct.[3] Stated differently, because the record does

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[3] Again, I note that our precedent is ambiguous regarding the correct analytical framework in a qualified-immunity context when intent is an element of the cause of action. *Compare McMillian*, 88 F.3d 1554 (in which the court assumed, for purposes of qualified-immunity analysis, that the defendants possessed an intent to punish the plaintiff, regardless of possible evidence of a lawful motive on the part of the defendants), with *Foy*, 94 F.3d at 1534-35 ("[W]hen an adequate lawful motive is present, that a discriminatory motive might also exist does not sweep qualified immunity from the field. . . . Unless it, as a legal matter, is plain under the specific facts and circumstances of the case that the defendants' conduct – despite his having adequate lawful reasons to support the act – was the result of his unlawful motive, the defendant is entitled to immunity.").

There are other contexts in which the role of evidence of subjective intent of a state actor complicates the qualified-immunity question. Some courts have found, for instance, that a finding of a genuine issue of fact with respect to a defendant's subjective intent necessarily precludes entitlement to qualified immunity when the claim advanced is deliberate indifference to medical needs under the Eighth Amendment. *See, e.g., Weyant v. Okst*, 101 F.3d 845, 858 (2nd Cir.1996) ("[W]hether it was reasonable for the officers to believe their actions met the standard set by those principles depends on whether one believes their version of the facts. That version is sharply disputed, and the matter of the officers' qualified immunity

not reveal definitively that Walker violated a valid state anti-nepotism policy at the time the relevant events occurred, it also does not explicitly show that the defendants could have demoted Walker, at least in part, for violating this policy. Indeed, because we cannot discern conclusively at this juncture whether the defendants had some lawful justification for their decision to demote Walker, we do not know whether there exists an application of materially similar facts to law that may or may not have placed the defendants on notice that their conduct violated a clearly established right; in other words, we cannot decide the core qualified immunity question. For this reason, I believe that it is inappropriate to reach the remaining issue raised in this appeal.

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therefore cannot be resolved as a matter of law."); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir.) (stating that "[t]he doctors further argue that Jackson failed to show a genuine issue of material fact as to whether they were deliberately indifferent, in fact, to his medical needs. As to that question we lack jurisdiction. . . . It is a question reviewable after trial. We are instructed by the Supreme Court [in *Johnson v. Jones*] that appellate jurisdiction is lacking. . . . Given the district court's determination that there is a triable issue as to deliberate indifference, the doctors were not entitled to summary judgment on the ground that they could reasonably believe their conduct did not violate clearly-established law." *Cert. denied*, ___ U.S. ___, 117 S.Ct. 584, 136 L.Ed.2d 514 (1996) (citations omitted). The claim of deliberate indifference obviously is not at issue in this case. An examination of this claim does serve to highlight, however, the unsettled state of the law as it pertains to the court's basis for jurisdiction – as well as its analytical approach – in qualified-immunity cases when subjective intent is raised as a disputed predicate question of fact.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-8338

MICHAEL WALKER,

Plaintiff-Appellee,

versus

ROBERT SCHWALBE, individually and in his official capacity; DARRELL DEAN, individually and in his former official capacity; ROY PARRISH, individually and in his official capacity; DAVID EVANS, in his official capacity only,

(Filed Aug. 29, 1997)

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: BIRCH, Circuit Judge, RONEY and FARRIS,* Senior Circuit Judges.

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*Honorable Jerome Farris, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Judge Stanley S. Birch
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Michael Walker,

Plaintiff,

v.

Robert Schwalbe, et al.,

Defendants.

CIVIL ACTION
4:92-cv-10-HLM

(Filed Mar. 14, 1996)

ORDER

This case is before the Court on Defendants' Post-Remand Motion for Summary Judgment [57], Plaintiff's Motion to File a Response to Defendants' Summary Judgment Submissions on Reply [70], Plaintiff's Motion to File Swafford Transcript Excerpts and Memorandum in Support [73], and Plaintiff's Motion to File Supplemental Affidavit and Memorandum in Support [74] and Plaintiff's Motion to Further Supplement His Response on Summary Judgment and Memorandum in Support [79].

I. Defendants' Post-Remand Motion for Summary Judgment [57], Plaintiff's Preliminary Objection to Defendants' Motion for Summary Judgment and Exhibits [62]

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) authorizes summary judgment when all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and . . . the moving

party is entitled to a judgment as a matter of law." A district court "can only grant summary judgment 'if *everything* in the record . . . demonstrates that no genuine issue of material fact exists.' " *Tippens v. Celotex Corp.*, 805 F.2d 949, 952 (11th Cir. 1986) (quoting *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980)).

It has long been established that the party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Bingham, Ltd. v. United States*, 724 F.2d 921, 924 (11th Cir. 1984). The moving party's burden is discharged by " 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In assessing whether the movant has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 469 (11th Cir. 1993). Once the moving party has supported its motion adequately, the non-movant has the burden of showing summary judgment is improper by coming forward with specific facts that demonstrate there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

When considering motions for summary judgment, the court does not make decisions as to the merits of disputed factual issues. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Ryder Int'l Corp. v. First American Nat'l Bank*, 943 F.2d 1521, 1523 (11th Cir. 1991). Rather, the court only determines whether there are genuine issues

of *material* fact to be tried. Applicable substantive law identifies those facts that are material. *Anderson*, 477 U.S. at 248 ("[I]t is the substantive law's identification of which facts are critical and which facts are irrelevant that governs."). Disputed facts which do not resolve or affect the outcome of a suit will not properly preclude the entry of summary judgment because such facts are not material. *Id.*

In addition to materiality, courts also must consider the genuineness of the alleged dispute. "[S]ummary judgment will not lie if the dispute about a material fact is *'genuine.'* " *Id.* (emphasis added). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Moreover, for factual issues to be genuine, they must have a real basis in the record. *Matsushita*, 475 U.S. at 587. The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Id.* at 587 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968)). "[T]his standard mirrors the standard for a directed verdict." *Anderson*, 477 U.S. at 250. "[T]he inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

B. Facts

Keeping in mind that, when deciding a motion for summary judgment, the Court "must view the evidence and all factual inferences in the light most favorable to the party opposing the motion," the Court will now give a statement of facts. *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 469 (11th Cir. 1993). This statement does not represent actual findings of fact. It is simply a statement of the facts as they must be construed at the summary judgment stage of this case.

Vista Community Programs ("VISTA") provides mental health, mental retardation and substance abuse services and programs for Walker, Chattooga, Catoosa and Dade counties in Northern Georgia. VISTA is funded by the Walker County Board of Health through a contract with the Georgia Department of Human Resources ("DHR"). VISTA employees are subject to DHR policies and procedures.

Plaintiff Michael Walker began his employment with VISTA in November 1982. In 1986 he was promoted to Mental Health/Mental Retardation Coordinator, Senior. This position required that he supervise all VISTA services and programs for the developmentally disabled. He was responsible for all budgetary issues pertaining to mental retardation programs. Throughout his career he received excellent performance reviews.

At all relevant times, Defendant Dean was the DHR District Health Director. As such, he was the principal DHR official charged with overseeing VISTA. In July 1988 Defendant Dean hired Robert Wesley as VISTA's interim Area Director. In September 1989, Mr. Wesley assumed

the position on a permanent basis. Mr. Wesley was Plaintiff's superior in the VISTA chain of command. Tom Nickell was hired as VISTA's business manager. During the first year of Mr. Wesley and Mr. Nickell's tenure, budget information was accessible to VISTA employees, and it was generally complete and accurate. As time passed, however, this budget information was less accurate. Plaintiff became very concerned and protested these matters to Mr. Wesley and Mr. Nickel [sic]. For example, Plaintiff protested Mr. Nickell's practice of reporting maximum expenditures in mental retardation programs that were not truly incurred, a practice that Plaintiff believed violated DHR regulations. Mr. Nickell's practice also prevented mental retardation programs from effectively maximizing expenditures for needed appropriations and hindered Plaintiff in effectively managing the budgets. When Plaintiff and others voiced concerns in meetings of high level VISTA staff ("the executive Committee"), Mr. Wesley and Mr. Nickell began to withhold budget information. This made it even more difficult for senior VISTA personnel to adhere to budget requirements and to ensure that services were provided effectively to VISTA clients.

Plaintiff also expressed his concerns to Mr. Wesley about certain other practices at VISTA. He informed Mr. Wesley of his concern that the garage where all VISTA vehicles were repaired was charging exorbitantly high prices. Plaintiff was also disturbed by the fact that several vehicles needed repairs for problems that the garage had supposedly already fixed. Mr. Wesley had directed VISTA staff to use this garage for servicing all vehicles. In doing so, Mr. Wesley had not solicited bids from other garages

to determine which local repair service would best serve VISTA's needs.

Plaintiff, moreover, was concerned that Mr. Wesley had directed that all VISTA vehicles be cleaned at a business run by VISTA employees and their relatives. Plaintiff told Mr. Wesley he believed this arrangement to be a conflict of interest for these moonlighting employees. Plaintiff took issue with the high cost of the cleanings and believed these funds should be used to serve clients in substantive programs.

Plaintiff also expressed concern over VISTA employee committees which sometimes met during work hours and conducted fundraisers in the community to allegedly raise money for VISTA programs. The money, however, was used for weekend social activities for those employees.

In July 1991 Georgia's Governor directed all state agencies to submit budget reduction proposals. Mr. Wesley and Mr. Nickell continued to withhold budget information from Plaintiff and other Executive Committee members. After July 16, 1991 Plaintiff learned that Mr. Wesley and Mr. Nickell planned to propose closing the Chattooga County Service Center. This Center provided services to approximately forty mentally disabled Northwest Georgia citizens. Plaintiff worried that the closing would harm these disabled clients. Plaintiff also opposed the closing because he believed that it was inconsistent with DHR headquarter's budget proposal request. Plaintiff urged Mr. Wesley and Mr. Nickel [sic] to reconsider their plan, but they would not.

Prior to the summer of 1991, Plaintiff had always attempted to resolve his work related concerns by discussing them with other VISTA personnel. When his efforts to convince Mr. Wesley and Mr. Nickel [sic] to alter their proposal failed, Plaintiff felt compelled to seek assistance from local legislators. Plaintiff contacted Georgia House of Representatives member Mike Snow and requested a meeting to discuss his budget concerns. On or about August 6, 1991, high level VISTA staffers Ernest Taylor, Nora Swafford and Plaintiff met with Rep. Snow at his home in the evening. State Representatives Ken Poston and Tim Perry attended the meeting, as did state Senators Sonny Huggins and Bob McCoy (hereinafter collectively referred to as "the Legislators"). At this meeting, they discussed Plaintiff's budgetary concerns. They also discussed a three page list of "possible improprieties" at VISTA that had been given to Representative Snow. When Plaintiff had knowledge about a particular allegation of impropriety, he shared that information with the Legislators. He was primarily concerned about budget expenditures, the car wash service and the car repair service. Plaintiff never feared that Mr. Wesley's budget proposal would cost Plaintiff his employment with VISTA because he believed that his employment was protected by state merit system policies.

As a result of this meeting with the Legislators, DHR's Office of Fraud and Abuse began an investigation of the allegations of impropriety at VISTA. David Nave conducted the investigation. Defendant Schwalbe, an Audit Manager with DHR, was assigned to assist Mr. Nave. On October 9, 1991 Defendant Dean informed VISTA staff that Mr. Wesley and Mr. Nickell had been

proposed for dismissal and that Defendant Dean would be assuming the responsibilities of the Area Director. Defendant Dean also stated that Defendant Schwalbe would be assuming Mr. Nickell's former position. On November 21, 1991 Defendant Schwalbe informed VISTA staff that the investigative report was completed. The report contained roughly forty written pages and reviewed more than thirty-nine allegations of impropriety. In summary, the report:

> support[s] the allegations that Vista Community Programs have been mismanaged. There is a substantial amount of evidence to show negligence, inefficiency, misconduct and apparent violations of Georgia law. The evidence clearly shows that Vista Administration has failed to comply with Department of Human Resources rules and regulations and the Master agreement between DHR and County Board of Health. In fact, the findings indicate that Vista Administration has shown little or no regard for DHR policy and have operated the programs on an arbitrary basis.

VISTA Investigative Summary at 35. The report included investigations of several alleged instances of nepotism and concluded at least one was a clear violation of DHR policy. The investigation, and the report itself, generated a great deal of media attention in the Northwest Georgia area.

On November 22, Defendant Dean delegated to Defendant Schwalbe responsibility for managing daily administrative activities at VISTA, evaluating staff performance, and initiating or proposing disciplinary actions.

Defendant Dean remained the reviewing authority for proposed adverse actions.

Some Walker County Board of Health members were upset that the Legislators, and not they, had been contacted about the alleged improprieties. The Walker County Board of Health considered refusing to renew its status as lead county for DHR's VISTA program. Members of the Board of Health were aware that Plaintiff was among those who had complained to the Legislators. Members of the Board of Health were embarrassed by the negative publicity the investigation had created. Defendant Dean ultimately resigned his position at DHR due to the investigation.

In VISTA fiscal year 1990 and 1991, Plaintiff's wife, Crystal Walker, served as a VISTA teacher consultant. Mrs. Walker's immediate superior at VISTA was Amanda Boyd, Director of the Walker County Service Center. Plaintiff was Amanda Boyd's superior in the VISTA mental retardation program chain of command. Prior to hiring Crystal Walker, Plaintiff and Ms. Boyd reviewed all available written policies regarding employment of relatives to ensure that such employment was not prohibited. The relevant policy on employment of relatives is as follows:

Section 1: Policy

Subject: Employment of Relatives

Legal References:

A. The policy of the Department of Human Resources does not preclude the employment of relatives.

. . . .

C. For purposes of this Policy, Relative means . . . spouse. . . .

Section II: Procedures

A. Relatives shall not be employed in situations in which a *direct* superior-subordinate relationship will exist between the relatives, except where such superior-subordinate relationship is essential to the conduct of the job – i.e., houseparents, etc.

. . . .

D. Clarification of the provisions of this policy and procedure may be secured from the Office of the Commissioner of DHR.

Georgia DHR Administrative Policy and Procedures Manual, Part XVII. F. 5. (emphasis added).[1] Plaintiff suggested that Ms. Boyd contact the Personnel Office regarding the issue.

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[1] The Court notes the existence of Defendants' exhibits G, H and I filed in support of Defendants' Summary Judgment Motion. Defendants contend that these documents are the nepotism and conflict of interest policies applicable to VISTA employees at the time Plaintiff signed Crystal Walker's contracts. Defendants, however, have produced no evidence on this issue other than the exhibits themselves and Defendants' bare assertions in their affidavits that they were the applicable policies. Given that Plaintiff disputes this fact and given that Defendants have not produced information pertaining to how DHR regulations are promulgated, revoked or to whom they are applicable, the Court concludes that a question of fact exists regarding which specific policy governed VISTA employees at the time Plaintiff acted. The Court, therefore, must resolve this dispute in Plaintiff's favor.

Plaintiff and Ms. Boyd concluded that employment of Mrs. Walker was not precluded by relevant policies. They agreed that Ms. Boyd would be wholly responsible for all supervision, terms and conditions of Crystal Walker's employment, and that Plaintiff would have no input regarding Ms. Walker's employment. Plaintiff, Mr. Wesley and Defendant Dean signed Mrs. Walker's contract. As agreed, during Crystal Walker's tenure at VISTA, Plaintiff had no involvement in the supervision of Crystal Walker's work.

On December 4, 1991, after release of the investigative report, Defendant Schwalbe met with Plaintiff and stated that he had received a phone call from a member of the Walker County Board of Health, and was asked to review the VISTA contracts with Crystal Walker. Defendant Schwalbe reviewed these contracts to determine if they were improper. Plaintiff attempted to explain his view that DHR regulations had not been violated by his wife's employment.

On December 5, Defendant Schwalbe gave Plaintiff a notice of proposed demotion and disciplinary salary reduction. This notice stated in relevant part:

> On behalf of VISTA Community Programs you executed/entered into for Fiscal Years' 1990 and 1991, a contract/memorandum of agreement with your spouse, Crystal Walker. This contract was signed by you. . . . and was signed by your spouse as a Professional Teacher Consultant. The contract was also signed by VISTA's Area Director, Walker County MR Service Center Director and District Health Director.
>
> . . . .

It is charged that your [sic] committed a very serious act of misconduct in your capacity as Developmental Services Chief over the Mental Retardation Program when you entered into a contract with your spouse on behalf of VISTA Community Programs. Your action was in violation of Department of Human Resources and Grants to Counties Policies concerning employees standards of conduct, conflicts of interest, and employment of relatives. Furthermore, VISTA has specific written policies that set forth employee standards of conduct and potential conflicts of interest as stated in Section I, Part A:

> In order to promote honest and corruption-free government, the Department of Human Resources will not tolerate conflicts of interest among its officers or employees. Officers or employees of the Department of Human Resources who place themselves, or are found, in a conflicts [sic] of interest will be subject to disciplinary actions as prescribed by the State Personnel Board, judicial process, and departmental administrative process.

Your actions in contracting with your spouse constitutes [sic] a conflict of interest and a violation of standards of conduct in that any issues regarding non-performance or compliance with contractual provisions would or could be biased by your relationship.

It is also charged that you were negligent and inefficient in the performance of your duties when you directed a subordinate to obtain approval from you [sic] superior for a contract which you were entering into with your spouse.

Defendants Schwalbe and Dean knew that Plaintiff had been one of the VISTA employees who had spoken with the Legislators. Plaintiff pursued a written appeal to Defendant Dean on December 16, 1991. On December 18, Defendant Dean upheld the proposed demotion and salary reduction. The demotion cost Plaintiff almost $3,200 per year. On December 19, Defendant Dean informed Plaintiff that he would be transferred to another center which was forty miles from Plaintiff's home. Plaintiff later applied for a promotion to his previous position but was denied without an interview. Because he believed that his opportunities to advance within VISTA had been foreclosed by his conversation with the Legislators and the resulting investigation, Plaintiff subsequently abandoned his career at VISTA.

After the meeting with the Legislators, Ernest Taylor was removed from the management team of VISTA and placed under the authority of one of his subordinates. No reason was given for this decision, and he knows of none. After the conclusion of the investigation, Mr. Schwalbe removed Nora Swafford from the management team at VISTA and transferred her from her Fort Oglethorpe office, where she had worked for twelve years, to the VISTA office in LaFayette Georgia. Mrs. Swafford knows of no justification for these actions.[2]

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[2] The Court notes that Plaintiff objects to the use of Plaintiff's deposition and Earnest [sic] Taylor's deposition in support of Defendants' Summary Judgment Motion. Defendants, on the other hand, object to the use of the affidavits of Plaintiff, Amanda Boyd, Mike Snow, McCracken R. Poston, Jr., Ernest Taylor and Nora Swafford in support of Plaintiff's response to Defendants' Motion for Summary Judgment. The

C. The Law

Plaintiff alleges that Defendants violated his First Amendment right to free speech by demoting him in retaliation for his conversation with the Legislators. Plaintiff seeks damages against Defendants in their individual capacities. Defendants move the Court to grant summary judgment based on qualified immunity. The Court, therefore, must determine whether (1) the aforementioned facts demonstrate a violation of Plaintiff's First Amendment rights and (2) whether Defendants are, nonetheless, protected by the doctrine of qualified immunity.

Court concludes that portions of the affidavits contain inadmissible material and those portions have been excluded from consideration. The Court also sustains Plaintiff's objection to the use of Mr. Walker's and Mr. Taylor's depositions because they were prepared for use in another case. The Court simply considers it unfair to consider them given the circumstances of this case and the various other cases stemming from the VISTA investigation. The Court concludes, however, that the use of these depositions would not have affected the Court's view of the facts of this case because of the rule that the Court must draw all reasonable inferences in Plaintiff's favor at this stage. In fact, the Court's ruling on this matter damages Plaintiff's case if it damages anyone's. This is so because the Court has not considered the excerpt of Defendant Dean's testimony from another of this Court's cases that Plaintiff has provided. When viewed in the light most favorable to Plaintiff, this testimony established that Dr. Dean had knowingly failed to enforce VISTA's nepotism policy several months before Plaintiff was punished for this offense. The testimony would have provided circumstantial evidence, therefore, that the Plaintiff's alleged nepotism violation was nothing but a pretext for demoting Plaintiff in retaliation for his speech.

1. First Amendment Retaliatory Discharge

In *Beckwith v. City of Daytona Beach Shores, Fla.*, the Eleventh Circuit reiterated the law pertaining to retaliatory discharge claims in this Circuit:

> This Circuit examines First Amendment retaliatory discharge claims under [a] four part test. . . . [We] examine[ ] (1) whether the employee's speech involves a matter of public concern, (2) whether the employee's interest in speaking outweighs the government's legitimate interest in efficient public service [("the *Pickering* balance")], (3) whether the speech played a substantial part in the government's challenged employment decision, and (4) whether the government would have made the same employment decision in the absence of the protected conduct.

58 F.3d 1554, 1563-64 (11th Cir. 1995) (internal citations and quotations omitted). "The first two elements of the . . . test are questions of law designed to determine whether the employee's speech is protected by the First Amendment." *Id.* "The third and fourth elements of the . . . test are questions of fact designed to determine whether a retaliatory motive was the legal cause of the challenged employment decision." *Id.* at 1564. The Court concludes that Plaintiff has produced sufficient evidence of each of these four elements to overcome summary judgment in the instant case.

First, "[t]he court examines the content, form, and context of the employee's speech to determine whether it addresses a matter of public concern." *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989). As to "content," few subjects are of greater public concern than the

proper allocation of public monies and the exposure of inefficiency, waste and corruption by public officials. *Id.* at 1566 (in case alleging retaliation because of plaintiff's complaint to city manager alleging corruption within police department, court stated "a core concern of the first amendment is the protection of the 'whistle-blower' attempting to expose government corruption.").[3] As to form and context, Plaintiff spoke in a meeting with his local elected officials who were concerned with improving the services VISTA provided to the public. *Kurtz v. Vickrey*, 855 F.2d 723, 727 (11th Cir. 1988) (courts have considered whether speech "at issue was made primarily in the employee's role as citizen, or primarily in the role of employee.") He did so, moreover, only after exhausting his avenues within VISTA to effect this change. The Court concludes, therefore, that Plaintiff's speech clearly must be characterized as a matter of public concern.

Second, while Plaintiff had a very significant interest in speaking with the Legislators in order to prevent harm to the VISTA program and the community it served, Defendants had no legitimate reason for preventing such a conversation.[4] *Stough v. Gallagher*, 967 F.2d 1523, 1529 (11th Cir. 1992) (Defendants not entitled to qualified immunity when they present no evidence to demonstrate

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[3] The Court notes that the fact that local public officer holders were sufficiently interested in what Plaintiff had to say that they arranged to meet with him indicates that Plaintiff's speech was a matter of public concern.

[4] In fact, the Court notes that Defendants have not even made the argument that they had an interest in punishing Plaintiff's speech. Instead, Defendants have argued that they had an interest in enforcing VISTA's nepotism policy, but these interests are irrelevant to the *Pickering* balance. *See infra* note 5.

that speech affected the efficiency of public services their office provides). Plaintiff spoke on his own time, and did so in a restrained and responsible manner. *See Hansen v. Soldenwagner,* 19 F.3d 573, 577 (11th Cir. 1994) ("Precedents recognize that the manner of a public employee's speech is an important element in the *Pickering* balance."); *Bryson,* 888 F.2d at 1565 ("the context and circumstances of the employee's speech must be considered."). Defendants could not even complain that Plaintiff's speech disrupted important working relationships among VISTA employees because his speech primarily constituted criticism of Mr. Wesley and Mr. Nickell who had already been dismissed when Plaintiff was demoted. *See id.* at 1567 ("In considering whether Bryson's speech impeded the city's ability to perform its duties efficiently, we examine whether the statement impairs discipline by superiors or harmony among co-workers, [or] has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary.").[5]

Third, "[i]t is neither possible nor desirable to fashion a single standard for determining when an employee

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[5] The Court notes that Defendants argue that the Court should consider Defendants' interest in enforcing nepotism rules when determining whether the second prong of the *Beckwith* test is satisfied. The Court concludes, however, that the Court must only balance Plaintiff's interest in speaking against Defendants' interest in prohibiting the speech. This view is consistent with the purpose of the first two elements of the *Beckwith* test which is to determine if the *speech* was protected by the Constitution. The existence of a nepotism violation has no relevance to determining the *nature* of the speech at issue. Instead, Plaintiff's alleged nepotism violation becomes relevant under the third element of the *Beckwith* test in which the Court must determine the true cause for Plaintiff's demotion.

has met her initial burden of demonstrating that a retaliatory intent was a 'substantial' or 'motivating factor' behind a government employment decision. . . . Nevertheless, . . . an employee's burden is not a heavy one." *Beckwith*, 58 F.3d at 1565. "[P]urely circumstantial evidence, taken in the light most favorable to the plaintiff, can create a jury question on the issue of the government's motive." *Id.* The Court concludes that Plaintiff has produced sufficient circumstantial evidence that Defendants enforced the nepotism and conflict of interest policies against him as retaliation for his speech.

First, the evidence indicates that Dr. Dean had a motive to retaliate against Plaintiff because Plaintiff's speech had instigated an investigation that led to his resignation. Defendant Schwalbe, moreover, was Defendant Dean's subordinate at VISTA and had, therefore, an indirect motive to retaliate. Second, the evidence indicates that the Members of the Walker County Board of Health had a motive for retaliating against Plaintiff because they had been embarrassed by the investigation. Board members knew Plaintiff had been involved in the instigation of the investigation, and a member of the board requested that Mr. Schwalbe investigate Mrs. Walker's contracts. These circumstances also support the inference that Defendant Schwalbe had a motive to retaliate against Plaintiff by enforcing the nepotism policy against him when he would not otherwise have done so. Retaliating against Plaintiff would satisfy angry Board of Health members and, therefore, might be good for Defendant Schwalbe's career at the Department of Human Resources. *See id.* at 1566. Third, the Court concludes that the relatively severe nature of the punishment Plaintiff

received is evidence of a retaliatory intent. Mr. Walker contracted for only two years of part time work for relatively little monetary compensation. Plaintiff's $3,000 per year demotion, therefore, seems disproportionate with the gravity of the offense. Fourth, Plaintiff's subsequent transfer and inability to return to his former position despite a history of excellent performance reviews indicates that he was a "marked man" at VISTA. The Court concludes, furthermore, that Plaintiff may not have actually violated applicable policies because he and his wife may not have been in a "direct superior-subordinate relationship."[6] This fact also supports the inference that the polices were used as a pretext.[7] The fact, furthermore, that adverse employment actions were taken against Mr. Taylor and Mrs. Swafford in the same period of time as Mr. Walker was demoted also supports the inference that Plaintiff's demotion was pretextual. The Court concludes, therefore, that Plaintiff has carried his burden of providing evidence that his "speech played a substantial part in the government's challenged employment decision."

Similarly, Plaintiff's evidence supports the inference that Defendants would not have demoted him had Plaintiff not spoken out: Plaintiff, therefore, has provided evidence of the fourth element of his First amendment claim.

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[6] *See supra* note 1.

[7] The Court concludes that the nepotism regulation had not been strictly enforced in the past at VISTA. This fact also supports the inference that Plaintiff's demotion was pretextual, although the inference is severely weakened by the fact that Plaintiff was demoted after a major investigation of various policy violations at VISTA which had resulted in the termination of several employees.

The Court concludes that Plaintiff has satisfied his burden of producing evidence in support of his claim.

2. Qualified Immunity

Suits against state officials in their "individual capacities" are severely limited by the doctrine of "qualified immunity." Qualified immunity "protects government officials performing discretionary functions from . . . liability if their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Lassiter v. Alabama A & M University*, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc) (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (citations omitted). Qualified immunity protects governmental officials from personal financial exposure because "[t]he line between lawful conduct and unlawful conduct is often vague and thin. . . . [I]t is unfair – and, as a matter of public policy, unwise – to impose personal liability on government officers unless the officers had advance notice that what they were doing was unlawful." *Lassiter*, 28 F.3d at 1152. Consequently, "[u]nless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit." *Id.* at 1149.[8]

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[8] The Eleventh Circuit also noted in *Lassiter* that even if a legal expert would have then concluded that defendant's conduct was unlawful at the time he acted, defendant would still be due qualified immunity if reasonable officials with defendant's responsibilities would not have known the act was

"Qualified immunity . . . focuses on the actual, on the specific, on the details of concrete cases." *Id.* at 1149-50. "[C]ourts must not permit plaintiffs to discharge their burden by referring to general rules and to the violation of abstract 'rights.' " *Id.* at 1150. "When considering whether the law applicable to certain facts is clearly established, the facts of cases relied upon as precedent are important. The facts need not be the same as the facts of the immediate case. But they do need to be *materially similar.*" *Lassiter,* 28 F.3d at 1150 (*quoting Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563, 1573, 1575 (11th Cir. 1992), (Edmondson, J., dissenting) *approved en banc,* 998 F.2d 923 (11th Cir. 1993)) (emphasis added) (citations omitted). "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." *Id.*

Because the Court decided above that Plaintiff has produced sufficient evidence to support a claim on summary judgment, the court must now determine whether clearly established law would have indicated to reasonable officials in Defendants' positions that demoting Plaintiff was unlawful. The Court concludes that it would.

At the time Defendants acted, clearly established law indicated that speech like Plaintiff's, which influenced

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unlawful. *Id.* at 1152 n.8; *Davis v. Scherer,* 468 U.S. 183, 196 n.13 (1984).

the allocation of public funds at VISTA and exposed fraud and waste, was a matter of public concern. *See Bryson*, 888 F.2d at 1566 ("Bryson's initial complaint to the city manager alleged corruption within the city police department. As the district court noted, a core concern of the first amendment is the protection of the 'whistle-blower' attempting to expose government corruption" and thus speech was matter of public concern); *Kurtz*, 855 F.2d at 729-30 ("a number of Kurtz's disputes with Vickrey arose out of Kurtz's concern that public dollars allocated for education were not actually being spent for educational purposes. For instance, Kurtz complained about the proposed closing of a branch of the university. He also disagreed with the use of university funds contributed to the purchase of a fire truck for the community. . . . [W]e believe that Kurtz's expressions such as the above are 'fairly characterized' as relating to a matter of public concern."); *Williams v. Board of Regents of University System of Georgia*, 629 F.2d 993, 1003 (5th Cir. 1980) ("The falsification of an official document . . . is such a grave *miscarriage of the public trust* that such conduct must be disclosed to the public if the people are to remain the true sovereigns in this country. . . . Based upon the foregoing, the district court was correct in its reading of the scales in favor of First Amendment protection."), *cert. denied*, 452 U.S. 926 (1981); *Pickering v. Board of Education*, 391 U.S. 563, 571-72 (1968) (dismissal of teacher for criticizing Board of Education for its allocation of school funds is matter of public concern); *Connick v. Myers*, 461 U.S. 138, 148 (1983) (implying that "inform[ing] the public that the District Attorney's Office was not discharging its governmental responsibilities" and "bring[ing] to light actual or

potential wrongdoing or breach of public trust" are matters of public concern).

The Court concludes, moreover, that the *Pickering* balance of interests weighs so heavily in Plaintiff's favor that no reasonable person could have thought Plaintiff's speech to be unprotected. *Busby v. City of Orlando*, 931 F.2d 764, 774 (11th Cir. 1991) ("Because no bright-line standard exists to put the employer on notice of a constitutional violation, [however,] this circuit has recognized that a public employee is entitled to immunity from suit unless the *Pickering* balance 'would lead to the *inevitable* conclusion that the discharge of the employee was unlawful.'. . . . we need only decide whether [the] result [of the *Pickering* balance] would be so evidently in favor of protecting the employee's right to speak that reasonable officials in appellees' place 'would necessarily know that the termination of [Plaintiff] under these circumstances violated [Plaintiff's] constitutional rights.' "). As indicated above, Plaintiff's speech was of the utmost importance, and Defendants simply had no legitimate reason to punish it. The Court can hardly imagine a more clearly protected instance of speech than Plaintiff's speech in this case. *See Williams*, 629 F.2d at 1003.

The Court concludes, therefore, that clearly established law would have indicated to reasonable VISTA officials in Defendants' positions that Plaintiff's speech was protected by the First Amendment. Reasonable VISTA officials, furthermore, would have known that they could not demote Plaintiff in the name of VISTA's nepotism policy when they did so to punish Plaintiff for his protected speech. Defendants, therefore, are not protected by qualified immunity from proceeding to trial.

To be thorough, the Court notes that the forgoing [sic] analysis is somewhat at odds with the proposition, established in *Harlow*, that qualified immunity is an objective analysis that does not consider a defendant's state of mind. The Court has extensively considered, therefore, whether the Court should ignore that fact that Plaintiff has established that Defendants had a illicit intent. Ignoring this fact would alter the qualified immunity inquiry. The Court would simply ask whether clearly established law indicated that Plaintiff could not be demoted for violating VISTA nepotism policy after he had uttered protected speech. The answer would clearly be "no."

The Eleventh Circuit does not appear to have faced this issue explicitly. At least two cases exist which could be read to support the position that Defendants' state of mind is irrelevant to the qualified immunity analysis. *See Busby*, 931 F.2d 774-75 n. 10 ("In light of the OPD's interest in maintaining loyalty, discipline, morale, and a favorable reputation with the public, we cannot say that . . . regulations that merely delay access to a public forum are so clearly unconstitutional so as to put appellees on notice that by enforcing the regulations they themselves were violating the law. Accordingly, if the regulations are reasonable, and the standard for determining good faith is objective, whatever [Defendants'] *subjective motivation may have been for enforcing those regulations* is irrelevant to whether he is entitled to immunity."); *Hansen*, 19 F.3d at 578. The Court, however, concludes that these cases are distinguishable from the instant case because they pertain only to the role of subjective motivation in the *Pickering* balance. The Court concludes, therefore, that the Eleventh Circuit has not

held that the Court must ignore the fact that Defendants had an illicit intent in enforcing the nepotism regulations.

The Court concludes that it must assume that Defendants only enforced the nepotism policy in order to retaliate against Plaintiff for his speech. The Court's conclusion is based upon its reading of a number of Eleventh Circuit cases and the fact that:

> in *Harlow,* the public official's state of mind was not an essential element of the underlying constitutional violation. Every Circuit that has considered the question has concluded that a public official's motive or intent must be considered in the qualified immunity analysis where unlawful motivation or intent is a critical element of the alleged constitutional violation.

Tompkins v. Vickers, 26 F.3d 603, 607 (5th Cir. 1994).

The Court, however, has seriously considered whether the mere existence of a valid VISTA regulation that Plaintiff appeared to have violated is, nonetheless, sufficient to entitle Defendants to qualified immunity. Specifically, the Court has considered whether a reasonable VISTA official could have thought that it was lawful to enforce a valid regulation against Plaintiff even if that official did so for an illegitimate reason. While such a belief does not appear untenable at first blush, the Court concludes that a reasonable VISTA official, who was aware of retaliatory discharge case law, would know that enforcing a valid regulation for a constitutionally prohibited reason was unlawful. Countless cases establish that demoting a public employee in retaliation for his protected speech is unlawful: the existence or nonexistence in these cases of a violation of a valid agency regulation

plays no part in the determination of whether a First Amendment violation has occurred. The Court concludes, therefore, that Plaintiff's violation of a valid VISTA regulation does not cloak Defendants in qualified immunity because reasonable officials in Defendants' positions would have known that Plaintiff could not be punished in the name of that violation if the officials did so to retaliate for Plaintiff's speech. *See Tindal v. Montgomery County Commission*, 32 F.3d 1535, 1540 (11th Cir. 1994) (finding defendants were not entitled to qualified immunity despite plaintiff's undisputed failure to follow legitimate order by her superior).

II. Plaintiff's Motion to File a Response to Defendants' Summary Judgment Submissions on Reply [70]

In the interest of justice, the Court grants this Motion.

III. Plaintiff's Motion to File Swafford Transcript Excerpts and Memorandum in Support [73]

In the interest of justice, the Court grants this Motion.

IV. Plaintiff's Motion to File Supplemental Affidavit and Memorandum in Support [74]

In the interest of justice, the Court grants this Motion.

V. Plaintiff's Motion to Further Supplement His Response on Summary Judgment and Memorandum in Support [79]

In the interest of justice, the Court grants this Motion.

VI. Conclusion

Accordingly, the Court **denies** Defendants' Post-Remand Motion for Summary Judgment [57], **grants** Plaintiff's Motion to File a Response to Defendants' Summary Judgment Submissions on Reply [70], **grants** Plaintiff's Motion to File Swafford Transcript Excerpts and Memorandum in Support [73], **grants** Plaintiff's Motion to File Supplemental Affidavit and Memorandum in Support [74] and **grants** Plaintiff's Motion to Further Supplement His Response on Summary Judgment and Memorandum in Support [79].

IT IS SO ORDERED, this the 14th day of March, 1996.

/s/ Harold L. Murphy
UNITED STATES
DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
NOV 28 1997
CLERK

No. 97-740

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ROBERT SCHWALBE, *et al.*,

Petitioners,

v.

MICHAEL WALKER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

Did the lower courts correctly identify clearly established law with materially similar facts [based upon standards even more stringent than this Court requires], thereby obviating the need for review or remand other than to order that Respondent's claim should proceed to trial?

II

Did the lower courts properly find that Respondent presented such significant evidence of unlawful intent that *Crawford-El v. Britton* would not affect the outcome of this case even if "clear and convincing" evidence is required?

III

Did the lower courts properly consider evidence of unlawful intent in holding that Petitioners violated clearly established law, where the conduct was not objectively legally reasonable, and where intent is an element of the underlying constitutional claim?

PARTIES BELOW

Respondent hereby shows that Mr. Roy Parrish was dismissed **without** prejudice in 1992. *Contra* Pet. at ii; Supreme Court Rule 15. 2.

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Michael D. Walker, respectfully submits this Brief in Opposition to the Petition for Certiorari filed in the above-captioned case.

STATEMENT OF THE CASE

A. Statement of Facts

1. Preliminary Objection to Petitioners' Statement of Facts

Petitioners' statement of facts will not assist this Court. Petitioners continue to appeal improperly basing their claims upon facts viewed favorably to **them**. *See* Pet. App. A-15a (Farris, J.), -18a-21a (Birch, J., dissenting). Thus, in order to clarify the issues, and as required, Respondent has set forth below the facts as properly viewed by the lower courts. Supreme Court Rule 15.2.

2. Relevant Facts In the Record Before the Lower Courts

Respondent Michael Walker is an exemplary former employee of Vista Community Programs. During his tenure as Developmental Services Chief, he was responsible for supervising all Mental Retardation programs and budgets. Pet. App. A-2a-3a; -C-30a-31a. At appropriate times, Respondent voiced concerns about issues of public import, including excessive billing and faulty repairs by a garage that Vista employees were required to use (and where no bids had been taken); employee conflicts of

interest through a car wash business and other questionable uses of funds; budget reduction proposals that would harm mentally disabled clients; and others. *Id.* A-3a-4a; C-30a-32a.

Respondent expressed these concerns properly to Bob Wesley, Vista Area Director, and to Business Manager, Tom Nickell, but to no avail. *Id.* A-3a-4a; C-31a-33a. Since these issues could not be resolved within the agency, Respondent arranged in August, 1991, to attend an off-duty meeting with his elected officials and with high-level Vista employees Ernest Taylor and Nora Swafford. *Id.* A-4a; C-33a. The attendees discussed Respondent's budgetary concerns and a three-page list of "possible improprieties," including certain items about which Respondent had direct knowledge. *Id.* Respondent was primarily concerned about the budget proposals, the garage billing and repair practices, and the car wash business. *Id.* Respondent was not concerned that the budget proposal would affect his job, as he believed that he was protected by state merit system policies. *Id.*

As a result of this meeting and a later request by the legislators, the Department of Human Resources began an investigation into impropriety at Vista, conducted by David Nave of the Office of Fraud and Abuse. *Id.* Mr. Nave was assisted by Petitioner Schwalbe, who was assigned from DHR's Office of Audits. In October, 1991, Petitioner Dean informed Vista staff that Mr. Wesley and Mr. Nickell had been proposed for dismissal, and that Dean would assume the responsibilities of the Area Director position and Schwalbe, those of the Business Manager position. *Id*-A-4a-5a; -C-33a-34a.

Upon completion of the investigation, Mr. Nave's report confirmed the existence of severe problems within the agency and "a substantial amount of evidence to show negligence, inefficiency, misconduct and apparent violations of Georgia law . . . " *Id.* After the report was released on November 21, 1991, it received a great deal of media attention and caused embarrassment to many, including Petitioner Dean, who resigned because of the investigation, and certain Walker County Board of Health members whose conduct also had been questioned. Pet. App. A-5a, 9a-11a; -C-35a, 43a-45a. The Board members were upset that the legislators, and not they, had been contacted about these problems. The Board threatened to end the county's status as lead funding county for Vista. *Id*- A-5a; -C-35a.

Petitioner Schwalbe was then asked by the Walker County Board to examine certain contracts in fiscal years 1990-1991 between Respondent's wife, Crystal Walker, a teacher-specialist in early intervention programs, and Amanda Boyd, the Vista supervisor and director of the Walker County Service Center, who solely supervised Mrs. Walker's employment. *Id* -A-5a-6a; -C-35a-37a. Back in 1989, and before this arrangement was first approved, Respondent and Ms. Boyd had reviewed all available written policies regarding employment of relatives to ensure that the arrangement was permitted. *Id*-.A-5a; -C-37a. Respondent also directed Ms. Boyd to seek approval without his intervention from Vista officials, and after such was received, Respondent, Wesley and Petitioner Dean all signed these contracts. *Id.* During Crystal Walker's service, Respondent had no involvement whatsoever in the supervision of Crystal Walker's work. *Id.*-C-37a.

Notwithstanding these facts and the efforts made to ensure the propriety of this arrangement--as was explained to Schwalbe by both Respondent and Ms. Boyd--Schwalbe charged Respondent with violating nepotism policies and with "negligence and inefficiency." *Id.*-A-6a; -C-37a-39a. Respondent has at all times denied that he committed any infraction or impropriety, claiming that this punishment was instead substantially motivated by his protected speech. Indeed, Petitioner Dean "had a motive to retaliate against Respondent because his speech led to the investigation that led to Dean's resignation." Pet.App. A-10a. Petitioner Schwalbe also had a motive to punish Respondent in order to appease his superiors: the Board of Health members and Dean, who had been embarrassed by the publicity and by certain findings of the investigation. *Id* -A-10a-11a; C-44a.

Record evidence shows that Petitioner Schwalbe admittedly was asked to punish Respondent for his speech, although Schwalbe claims not have sanctioned him for *that* reason. (Respondent's Brief in Opposition to Petitioners' Brief on Appeal-16). Petitioners have offered **"no legitimate reason"** for punishing Respondent's speech. Pet. App. A-10a; C-42a-43a.

Further evidence of wrongful motive stemmed not just from Petitioners' punishment of Respondent, but especially, from the extremely harsh nature of the sanctions imposed, even ". . . where it appears that [Respondent] did everything he could to make sure he was acting within Vista regulations." Pet. App. A-10a-11a; *see also* C- 35a-37a, 44a-45a. Moreover, Petitioners' charging Respondent with "negligence and inefficiency" for directing Ms. Boyd to receive direct assurance from Vista supervisors that the arrangement was proper and approved ". . . is illogical

considering the situation. Walker may well have been attempting to make sure that there was no actual impropriety and no appearance of it, but we do not resolve questions of fact." Pet. App. A-11a. Also, Petitioners took myriad adverse actions against the **other** employees who had attended the meeting with the legislators, thereby confirming a pattern of unlawful motivation. Pet. App. A-11a; C-39a.

Petitioner Dean secured Respondent's demotion and transfer even though Dean had approved the very contracts at issue; signed off on other contracts that Dean knew violated nepotism policies and then lied about it; and refused to punish yet another [non-whistleblowing] supervisor for nepotism violations occurring at the very time of the investigation. (Respondent's Brief in Opposition to Petitioners' Brief on Appeal-16-18). Notwithstanding Respondent's excellent employment history and achievements, he became a "marked man" at Vista and, after being refused even an interview for his former position, he felt compelled to resign and to accept employment in the private sector. Pet. App. C-45a.

B. Proceedings Below

Respondent hereby clarifies the Petition by offering a more precise discussion of the district court's ruling at the preliminary injunction stage. Supreme Court Rule 15.2

The district court found " . . . there to be a substantial likelihood that the plaintiff will prevail on the merits at trial," and that plaintiff's speech was protected speech under the First Amendment and based upon all relevant criteria. (Respondent's Brief in Opposition to

Defendants' Brief on Appeal- 3.) The trial court concluded that "the inferences a jury would likely draw from the facts and circumstances . . . would be that the adverse action against Plaintiff as an employee was in retribution for his exercise of First Amendment rights." *Id.* The court found that **"it will be very difficult"** for [defendants] to prove that they would have punished Respondent absent his speech. (Tr. 316-317)(emphasis added).

The court only denied the preliminary injunction because it found "the public interest would be disserved" in light of an "ongoing investigation," [which, ironically, was later revealed to have been directed at the other whistleblowers, Taylor and Swafford.] Nonetheless, any initial question that the court might have had about Petitioners' motive did not affect the court's holding that a **jury** would likely rule in Respondent's favor. (Tr. 319-320). And any remaining doubt was clearly resolved in Respondent's favor based upon significantly developed evidence presented on summary judgment and then on appeal. Pet. App. C-27a-53a; A-1a-15a.

REASONS FOR DENYING THE WRIT

The Petition does not warrant this Court's acceptance. The claim that the courts below erred in identifying clearly established law based upon the facts viewed favorably to Respondent fails to meet the Court's requirements. Supreme Court Rule 10. Also, and despite Petitioners' attempt to cling to the bootstraps of *Crawford-El v. Britton* No. 96-827 (1997) (pending), this case's outcome should be unaffected by the decision. *Crawford-El v. Britton*, 93 F.3d 813 (D. C. Cir. 1996) (*en banc*). First,

the discovery issues raised in *Crawford-El* have no bearing on this case, which has been ready for trial for years. *Id.* at 819-820. More importantly, the lower courts already have found significant "non-conclusory assertions of evidence . . . from which a fact finder could infer the forbidden motive," including through direct and circumstantial evidence. These findings would meet if not surpass a "clear and convincing" standard even if adopted in *Crawford-El* Indeed, unless this Court adopts the standard urged by Petitioner and D.C. Circuit Judge Silberman--but not by **any** parties appearing in *Crawford-El*--that decision simply should not affect this case. Finally, the courts below properly considered intent in analyzing qualified immunity, as is consistent with Supreme Court precedent and most Circuit Court decisions.

ARGUMENT

1. The primary issue presented here does not merit review because it is purely contextual: whether the lower courts erred in their fact-based assessments--made favorably to Respondent--when applying proper legal standards to First Amendment and qualified immunity claims. Supreme Court Rule 10; *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Anderson v. Creighton*, 483 U.S. 635 (1987).

The district court, as affirmed by the Court of Appeals, performed a sensitive and thorough analysis under *Pickering*, as refined in such cases as *Connick v. Myers*, 483 U.S. 138 (1984) and *Waters v. Churchill*, 511 U.S. 661 (1994), and as applied by the Eleventh Circuit in *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989), and *Beckwith v. City of Daytona Beach Shores, Fla.*, 58

F.3d 1554 (11th Cir. 1995). The district court carefully considered the important content of Respondent's speech and the proper conditions of his expression in holding the speech constitutionally protected. Pet. App. C-41a-43a. As the district court opined, "the Court can hardly imagine a more clearly protected instance of speech than Plaintiff's speech in this case." *Id.*-49a.

The Court of Appeals affirmed these findings and separately emphasized Respondent's "significant interest in speaking with the legislators in order to prevent harm" to the program and to the citizens served. *Id.* A-10a. Indeed, since the defendants presented **not one shred** of evidence of disruption from the speech, the lower courts properly found that defendants had "no legitimate reason" for punishing the same. *Id.*-A-10a-11a; C-42a-43a and nn.4-5. No more could be asked of courts applying the *Pickering* test, which is the **only** "purely legal issue" in determining qualified immunity on interlocutory appeal. And since the lower courts rightly found a genuine dispute about whether Petitioners were "substantially motivated" by Respondent's speech, there is no issue which merits this Court's review. *Id.* A-10a-11a, 15a; C-43a-45a; Supreme Court Rule 10.

Likewise, plenary review of the lower court's citation of "materially similar" cases would be pointless. Pet. at 14-15. First of all, the lower courts properly identified examples of "clearly established" cases with "materially similar" facts to confirm that "the contours of the right were sufficiently clear" so that Petitioners would know that their actions violated the law. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see* Pet. App. A-12a-15a; C-47a-49a, 51a-52a. In Respondent's opinion, the Court of Appeals has enforced a "clearly established law"

standard that is more difficult to satisfy than that of this Court. *Compare Anderson v. Creighton*, 483 U.S. at 640 ("the contours of the right [must be] sufficiently clear" to give notice of the violation) *with Lassiter v. Alabama A&M University*, 28 F.3d 1146, 1150 (11th Cir. 1994) *(en banc)* ("For qualified immunity to be surrendered, pre-existing law must dicate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing volates federal law in the circumstances;") *see also U. S. v. Lanier*, ___U.S.___, 117 S. Ct. 1219 (1997) (rejecting the Sixth Circuit's "substantially similar" standard as too stringent, albeit in a case involving criminal violations of constitutional rights). Thus, the lower court decisions for Respondent even under such strict standards confirm the merit of his claims.

Second, Petitioners' argument ignores the lower courts' correct, factual assumption that the punishment was substantially motivated by Respondent's speech, and not by claimed "nepotism," when the courts analyzed the clearly established law. Pet. App. A-10a-11a, 15a; C-43a-46a, 51a-52a. Based upon this assumption, the lower courts aptly identified First Amendment cases involving speech "materially similar" in content, form and context to Respondent's. *Id.* at A-14a; C-47a-49a.

Despite criticism from the lower courts, Petitioners continue to claim that they *could* demote an employee for violating an anti-nepotism policy because this asserted reason would not violate constitutional rights. This argument "miss[ed] the point" and was described as "inapposite" since it did not address whether Petitioners violated clearly established law for punishing Plaintiff's

speech. *See* Pet. App. A-14a-15a; C-42a-43a and nn. 4-5, 51a-52a; Pet. at 14-15. Indeed, Judge Birch dissented in part and sought to disallow review of Petitioners' argument, which ". . . effectively requires that we decide a factual issue . . . based neither on the record nor the drawing of reasonable inferences based on facts previously found. In my opinion, this type of purely factual decision-making is not the proper subject of an interlocutory appeal based on qualified immunity." *Id.*- A-18a-21a (Birch, J. dissenting). In any event, this argument clearly deserves no further consideration.

2. Petitioner argues that proof of unlawful motive must rest upon "clear and convincing evidence," a standard advocated by the plurality opinion in *Crawford-El v. Britton*. Pet. 7-8, 12-13. Respondent opposes any heightened summary judgment standards for determining genuine issues of fact in constitutional cases involving intent, and agrees with the dissenting opinion in *Crawford-El*. 93 F.3d at 847-end.

Furthermore, Respondent disagrees that an actual conflict exists between the other Circuit Courts of Appeals, which uniformly consider evidence of intent and generally apply ordinary summary judgment rules for determining genuine disputes of material fact. Supreme Court Rule 10 (a); s*ee* Pet. App. A-13a-14a (citing cases); *see also Grant v. City of Pittsburgh, et. al.*, 98 F.3d 116 (3d. Cir. 1996); *Alexis v. McDonald's Restaurants of Massachusetts*, 67 F.3d.341, 348-349 and n.7 (1st Cir. 1993); and *Hill v. Shelander*, 992 F.2d 714, 717 (7th Cir. 1993).

Importantly, though, and as mentioned above, *Crawford-El* will not affect this case because the Court of

Appeals explicitly found the existence in the record of specific "direct and circumstantial evidence" of intent, which clearly would suffice under the *Crawford-El* standard; hence, there is no need for remand. *Compare* Pet. App. A-9a-11a *with* 93 F.3d at 819 (the plaintiff must present "specific, non-conclusory . . . evidence . . . from which a fact finder could infer the forbidden motive.")

3. Finally, Petitioners urge a qualified immunity standard that ignores altogether the actor's subjective intent even when the plaintiff has shown that the conduct did **not** meet an "objective legal reasonableness" test. This argument misconstrues the holdings of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985), and *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); Pet. at 8-12. Furthermore, it is contrary to this Court's recent decisions, and fundamentally, to the reasons for which citizens can recover for constitutional wrongs.

In *Johnson v. Jones*, 515 U.S. 304 (1995), this Court disallowed an interlocutory appeal from a denial of qualified immunity based only upon a factual assertion that the officials had not engaged in the challenged conduct. The Court gave several reasons for its holding, even while noting that the denials of qualified immunity would cause constitutional torts with disputed issues of fact about intent to go to trial.

> Many constitutional tort cases . . . involve factual controversies about, for example, intent -- controversies that, before trial, may seem nebulous . . . We recognize that, where a district court's denial of summary judgment amounts to . . .

> a determination about 'genuine' issues of fact for trial, it still forces public officials to trial . . . . **Nonetheless, the countervailing considerations that we have mentioned (precedent, fidelity to statute, and underlying policies) are too strong to permit the extension of *Mitchell* to encompass appeals from orders of the sort before us . . .**

Johnson v. Jones, 515 U.S. at 316 (emphasis added); *see also Richardson v. McKnight*, ___U.S.___, 117 S.Ct. 2100, 2103 (1997) (The basic purpose of Section 1983 "is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights" and to provide related relief); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) ("[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional gurantees.")

Since many substantial, clearly established constitutional violations depend upon proof of intent, the standard urged by Petitioners would defy the very purposes for which the laws were passed, and would exceed *Harlow's* mandate to apply qualified immunity [only] when "**insubstantial claims**" are brought against government officials. *Harlow*, 457 U.S. at 814. This Court should reject this argument in no uncertain terms.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari presently.

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